No. 82-5082

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. GRIGGS and JACQUELINE M. GRIGGS,
Petitioners,

v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did not the Court of Appeals have discretion, in order to avoid manifest injustice to respondent, to excuse noncompliance with the technical requirements of Fed. R. App. P. 4(a)(4) and to decide respondent's appeal on the merits even though the notice of appeal was filed while respondent's post-trial motion was pending, where the post-trial motion was denied by the District Court four days after the notice of appeal was filed, where petitioners were not prejudiced by the premature filing of the notice of appeal and where the decision of the District Court was found to be legally erroneous and was reversed on the merits by the Court of Appeals?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Provident Consumer Discount Company respectfully requests that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 2, 1982 be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 680 F.2d 927 (3d Cir. 1982). The opinion of the United States District Court for the Eastern District of Pennsylvania is officially reported at 503 F. Supp. 246 (E.D. Pa. 1980).

FEDERAL RULES OF APPELLATE PROCEDURE INVOLVED

Fed. R. App. P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed. R. App. P. 2 provides:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Fed. R. App. P. 26(b) provides:

> Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Fed. R. App. P. 4(a)(1) provides:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

COUNTERSTATEMENT OF THE CASE

Petitioners Robert C. Griggs and Jacqueline M. Griggs commenced this action against respondent Provident Consumer Discount Company[1] in the United States District Court for the Eastern District of Pennsylvania on May 21, 1980, alleging violations of the Truth in Lending Act, 15 U.S.C. §§1601 et seq. ("the Act").[2] On December 24, 1980, the District Court granted summary judgment in favor of petitioners.

On January 16, 1981, respondent filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. The appeal, however, was dismissed because the District Court's order granting summary judgment was not appealable under Fed. R. Civ. P. 54. Subsequently, on November 5, 1981, the District Court directed the entry of a separate final judgment under Fed. R. Civ. P. 54(b).

On November 17, 1981, respondent filed a timely motion for reconsideration or to alter, amend or vacate the District Court's judgment pursuant to Fed. R. Civ. P. 59. On November 19, 1981, respondent filed the Notice of Appeal to the United States Court of Appeals for the Third Circuit which is the subject of the Petition for Writ of Certiorari and this Response. Four days later, on November 23, 1981, the District Court denied respondent's post-trial motion, and the case thereafter proceeded in the Court of Appeals.

By letter dated December 4, 1981, the Clerk of the Court of Appeals informed counsel that the case had been docketed in the appellate court.[3] Approximately two months later, on February 1, 1982, petitioners moved to dismiss the appeal for lack of jurisdiction on the ground that under their interpretation of Fed. R. App. P. 4(a) (4), respondent's Notice of Appeal was ineffective because it was filed before the District Court decided respondent's post-trial motion.

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1. Pursuant to Supreme Court Rule 28.1, the stock of Provident Consumer Discount Company, together with the stock of Provident Credit Corporation, is owned by the same individual shareholder.

2. The District Court's jurisdiction was invoked pursuant to Section 130(e) of the Act, 15 U.S.C. §1640(e) and 28 U.S.C. §1337, which confers jurisdiction over actions arising under any Act of Congress regulating commerce.

3. The Clerk's letter, attached to the Petition for Writ of Certiorari as Appendix "C", merely "directed" counsel's attention to Fed. R. App. P. 4(a)(4) in two lines near the bottom of the letter, above a notice marked as "IMPORTANT".

In an opinion and judgment issued on June 2, 1982, the Court of Appeals reversed the judgment of the District Court, holding that it had erred as a matter of law in finding that respondent violated the Act. In addition, the Court of Appeals, in footnote 2 of its opinion, found that petitioners had not been prejudiced by the premature filing of the notice of appeal and, therefore, that the matter before it was appealable even though the technical requirements of Fed. R. App. P. 4(a)(4) had not been fully satisfied. The Court of Appeals stated:

> "2. The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that '[a] notice of appeal filed before the disposition of any of the above motions shall have no effect.' Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 882 n.2 (3d Cir.), cert. denied, 101 S. Ct. 390 (1981); Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975); accord Williams v. Town of Okeboji, 599 F.2d 238 (8th Cir. 1979). See also 9 Moore's Federal Practice ¶204.14 (2d ed. 1982). In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal." (680 F.2d at 929 n.2).

Subsequently, the instant Petition for Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT'S AVOIDANCE OF MANIFEST INJUSTICE BY EXERCISING ITS DISCRETION TO EXCUSE NONCOMPLIANCE WITH A TECHNICAL RULE OF PRACTICE IS CONSISTENT WITH THE SETTLED POLICIES OF THIS COURT AND THE FEDERAL RULES

This Court has consistently held, in a variety of factual settings, that federal rules of procedure are to be interpreted liberally to achieve substantial justice and to facilitate the resolution of cases on their merits. See, e.g., Foman v. Davis, 371 U.S. 178, 181-82 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of. . .mere technicalities"); Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

The decision by the Court of Appeals herein to determine this case on its merits, despite the technically premature filing of the notice of appeal, is in complete harmony with this settled policy. In the instant case, nothing of substance would have been gained by enforcing strict compliance with Fed. R. App. P. 4(a)(4), since respondent's post-trial motion, which was pending when the notice of appeal was filed, was denied by the District Court. Moreover, the Court of Appeals found, and petitioners do not contest, that petitioners were not in any manner prejudiced by the premature filing of the notice of appeal. By contrast, had the Court of Appeals dismissed the appeal for noncompliance with Fed. R. App. P. 4(a)(4), respondent necessarily would have suffered manifest injustice, because the legally erroneous decision of the District Court, which was reversed on the merits by the Court of Appeals, would have been permitted to stand uncorrected.

Contrary to petitioners' assertions, the Court of Appeals had plenary authority under the Federal Rules of Appellate Procedure to exercise its discretion to excuse noncompliance with Fed. R. App. P. 4(a)(4). Pursuant to Fed. R. App. P. 2, a court of appeals may on its own motion "suspend the requirements or provisions of any of these rules in a particular case" in order to expedite its decision or for other good cause shown. (Emphasis added). This salient rule "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result." (Fed. R. App. P. 2, Adv. Comm. Note).

Thus, in several recent decisions, the Third Circuit has given effect to prematurely filed notices of appeal where, as in the present case, the appellee has not demonstrated any prejudice. See, e.g., United States v. Price, - F.2d - (No. 82-5030) (3d Cir. Sept. 14, 1982), slip. op. at p. 9; Horne v. Adolph Coors Co., 684 F.2d 254, 257 (3d Cir. 1982); Tose v. First Pennsylvania Bank, 648 F.2d 879, 882 n. 2 (3d Cir.), cert. denied, 454 U.S. 893 (1981). The rationale for the Third Circuit's position is an equitable one which effectuates the mandate of this Court in decisions such as Foman v. Davis and Conley v. Gibson, supra:

> "We are reluctant to treat the default [under Rule 4(a)(4)] as jurisdictional . . . in light of the substantial forfeiture that would result and the absence of any prejudice to appellees resulting from the premature filing. . . .We have discretion under Appellate Rule 2 to 'suspend the requirements or provisions of any of these rules in a particular case. . .on [our] own motion,' and we exercise our discretion to waive the Rule 4(a) default in this case. We do so 'to relieve litigants of the consequences of default where manifest injustice would otherwise result.' " Tose v. First Pennsylvania Bank, supra, 648 F.2d at 882 n.2. (Citations omitted).

The very fact that the legally erroneous decision of the District Court in the instant case was reversed by the Court of Appeals dramatically illustrates the wisdom of the Third Circuit's approach of allowing appeals to be decided on their merits despite noncompliance with technical rules of procedure.

Significantly, Fed. R. App. P. 2 is limited only by the qualification in Fed. R. App. P. 26(b) that, inter alia, a court of appeals "may not enlarge the time for filing a notice of appeal. . . ." The strictures of Fed. R. App. P. 26(b) are not implicated in the present case, where the notice of appeal was not filed dilatorily, but rather prematurely. Nor, as discussed infra, does significant authority exist for treating the requirements of Fed. R. App. P. 4(a)(4) as jurisdictional, so as irrevocably to deny effect to a notice of appeal filed during the pendency of a post-trial motion. Indeed, even the Advisory Committee on Appellate Rules has characterized Fed. R. App. P. 4(a)(4) as merely a desirable means of expediting the housekeeping function of the Courts of Appeals, rather than as a mandatory jurisdictional prerequisite to entertaining an appeal on the merits:

> "Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. . . . Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste [sic] effort. . . . Further, since a notice of

> appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of."

Fed. R. App. P. 4(a)(4), Adv. Comm. Note. (Emphasis added; citations omitted). See also 9 J. Moore, Federal Practice ¶204.14 (2d ed. 1982) (Rule 4(a)(4) should be held to be not jurisdictional and therefore subject to waiver).

Accordingly, there is no basis for expanding this Court's already overburdened docket to include the decision of the Court of Appeals herein, which is compatible in every respect with the liberal standards of construction previously declared by this Court and embodied in the Federal Rules. Indeed, construction of Fed. R. App. P. 4(a)(4) as a nonwaivable jurisdictional prerequisite would mark the return to inflexible pleading requirements where the form of an appeal is deemed of greater importance than its substance. The only result of strict compliance with Fed. R. App. P. 4(a)(4) in the instant case, where the post-trial motion was denied and the judgment stood as originally entered, would have been the refiling of a single paper. Such a result should not be permitted to override an appellant's right to have its case heard on the merits by a court of appeals.

II. THE PRESENT CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING HYPOTHETICAL QUESTIONS OF FIRST IMPRESSION CONCERNING THE APPLICATION AND INTERPRETATION OF FED. R. APP. P. 4(a)(4)

Claiming that the decision of the Third Circuit herein is "in square and irreconcilable conflict" with the decisions of several other Courts of Appeals, petitioners request this Court to resolve numerous questions concerning the interpretation and application of Fed. R. App. P. 4(a)(4) which, according to petitioners, "this Court has never addressed." (Petition for Writ of Certiorari, at pp. 8, 14).

However, petitioners' assertion of a serious division of opinion among the Circuit Courts on the issue whether the requirements of Fed. R. App. P. 4(a)(4) are jurisdictional in nature is grossly overstated. Thus, the cases relied upon by petitioners from the Sixth and Tenth Circuits are of questionable value as legal precedent. Because Bache Halsey Stuart Shields, Inc. v. Gitre, No. 81-1295 (6th Cir. Oct. 22, 1981), is an unpublished opinion, its precedential value even in the Sixth Circuit is doubtful. See 6th Cir. R. 24. Similarly, petitioners' citation of Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979), a decision rendered prior to the amendment of Fed. R. App. P. 4(a)(4), as authority for the "expected" position of the Tenth Circuit, is

prediction, not precedent.

The cases cited by petitioners from the Seventh, Eighth, Ninth and Fourth Circuits are either factually distinguishable from or legally consistent with the decision of the Third Circuit herein. United States v. Moore, 616 F.2d 1030 (7th Cir.), cert. denied, 446 U.S. 987 (1980), was a criminal case involving the construction of Fed. R. App. P. 4(b), which applies to criminal, not civil, appeals. United States v. Jones, 669 F.2d 559 (8th Cir. 1982), also arose in the context of a criminal appeal under Fed. R. App. P. 4(b). Significantly, however, the Eighth Circuit in Jones expressly recognized its power, where the circumstances so warrant, to exercise appellate jurisdiction under Fed. R. App. P. 4 notwithstanding the premature filing of a notice of appeal, a position which is consistent with that of the Third Circuit. 669 F.2d at 561. The Ninth Circuit in Calhoun v. United States, 647 F.2d 6, 10 (9th Cir. 1981), construed the word "disposition" in Fed. R. App. P. 4(a)(4) as synonymous with "announcement" to avoid rendering premature a notice of appeal filed after the oral denial of a post-trial motion, but before its formal entry. Finally, the Fourth Circuit in Laser Alignment, Inc. v. Warlick, 32 Fed. R. Serv. 2d 776 (4th Cir. 1981), has indicated that an argument of "considerable force" might be made for waiving the time requirements of Fed. R. App. P. 4(a)(4), "assuming that FRAP 4(a)(4) states a rule of practice and not a jurisdictional requirement." Id. at 779.

Accordingly, the reluctance of the Third Circuit to construe Fed. R. App. P. 4(a)(4) as jurisdictional is possibly inconsistent only with the decisions of the Fifth Circuit in Williams v. Bolger, 633 F.2d 410 (5th Cir. 1980) and Beam v. Youens, 664 F.2d 1275 (5th Cir. 1982), and with decisions of the Eleventh Circuit, e.g., United States v. Valdosta-Lowndes County Hospital Authority, 668 F.2d 1177, 1178 n.2 (11th Cir. 1982), which is bound by law to follow Fifth Circuit precedent. Even assuming that the Third and Fifth Circuits have at times espoused differing views as to the application and interpretation of Fed. R. App. P. 4(a)(4), the facts of the instant case make it an inappropriate vehicle for addressing the numerous hypothetical questions of first impression posed by petitioners. Here, respondent's post-trial motion was denied by the District Court just four days after the notice of appeal was filed; petitioners were not at all prejudiced by the premature filing of the notice of appeal; and dismissal of the appeal for noncompliance with Fed. R. App. P. 4(a)(4) would have shielded a legally erroneous trial court determination from corrective appellate review. Moreover, the Court of

Appeals, in footnote 2 of its opinion, did not squarely address or analyze at any length the jurisdictional issues which petitioners request this Court to review. Accordingly, the instant case does not provide a solid or clear-cut foundation upon which to establish precedent concerning Fed. R. App. P. 4(a)(4).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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